

**United States Department of Labor
Employees' Compensation Appeals Board**

ROBERT P. BROTEMARKLE, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Coon Rapids, MN, Employer**

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**Docket No. 04-114
Issued: May 3, 2004**

Appearances:
Robert P. Brotemarkle, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 15, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 27, 2003, which terminated his compensation benefits for failure to accept suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

Appellant, a 47-year-old letter carrier, filed a notice of traumatic injury on December 30, 1975 alleging on that date he injured his back in the performance of duty. The Office accepted his claim for muscle spasm lumbar and thoracic spines on January 23, 1976. The Office entered appellant on the periodic rolls on June 10, 1976. The Office later expanded his claim to include psychogenic pain disorder.

By decision dated April 26, 1987, the Office reduced appellant's compensation benefits based on his actual earnings as a general clerk working four hours a day. He retired from the employing establishment effective February 11, 1990. At the time he retired he was working four hours a day. Appellant elected to receive benefits under the Federal Employees' Compensation Act effective February 13, 1990 on April 9, 1990.

By decision dated July 12, 1996, the Office terminated appellant's compensation benefits effective July 20, 1996. Appellant requested reconsideration of this decision on August 25, 1996. In a decision dated November 22, 1996, the Office denied modification of the July 12, 1996 termination decision. Appellant requested review by the Board and in a decision dated January 11, 1999, the Board reversed the Office's November 22 and July 12, 1996 decisions.¹

Appellant again elected to receive benefits under the Act on March 25, 1999. On December 30, 2002 the employing establishment offered him a limited-duty position as a rehabilitation general clerk working six hours a day. In a letter dated April 30, 2003, the Office informed appellant that the offered position was suitable and granted him 30 days to accept or decline the position. He declined the position on May 26, 2003. The Office informed appellant that his reasons for refusing the position were not acceptable and granted him an additional 15 days to accept the position by letter dated June 17, 2003. By decision dated August 27, 2003, the Office terminated appellant's compensation benefits effective August 10, 2003 on the grounds that he refused an offer of suitable work.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.² A modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.³ The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.⁴

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of formal loss of wage-earning capacity decisions. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one

¹ Docket No. 97-772 (issued January 11, 1999).

² *Roy Mathew Lyon*, 27 ECAB 186, 198-90 (1975).

³ *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁴ *Ronald M. Yokota*, 33 ECAB 1629, 1632 (1982).

of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved, or that the claimant has been vocationally rehabilitated.⁵

The Office's procedure manual also provides in relevant part:

"9. *Claims Actions after Reemployment.* Cases where a claimant stops work after reemployment may require further action, depending on whether the rating has been completed at the time the work stoppage occurs.

a. *Formal [L]oss of [W]age-[E]arning [C]apacity Decision Issued.* If a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision (see paragraph 11 below). If the claimant retires, the CE should offer an election between [Federal Employees' Compensation Act] and OPM [Office of Personnel Management] benefits if appropriate. A penalty decision under 5 U.S.C. § 8106(c) should not be issued."⁶

ANALYSIS

In the present case, the Office terminated appellant's compensation on August 10, 2003 on the grounds that he refused an offer of suitable work. Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who ... refused or neglects to work after suitable work is offered ... is not entitled to compensation."⁷ Prior to terminating appellant's compensation on August 27, 2003, effective August 10, 2003, the Office had issued a formal loss of wage-earning capacity decision on April 26, 1987 in which it determined that the position of general clerk fairly and reasonably represented appellant's wage-earning capacity.⁸ However, the Office did not follow the applicable case law and procedures regarding appellant's wage-earning capacity prior to terminating his compensation. The Office did not address its prior

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (July 1997).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9a (December 1995).

⁷ 5 U.S.C. § 8106(c).

⁸ This position was found to reflect a 50 percent loss of wage-earning capacity. Appellant retired from the employing establishment on February 11, 1990. The Board notes that the above-described criteria for modifying formal loss of wage-earning capacity decisions remains the same regardless of whether a given claimant continues to work or stops work after the issuance of a formal loss of wage-earning capacity decision.

formal loss of wage-earning capacity decision or otherwise modify this loss of wage-earning capacity decision which was in place at the time that it made its suitable work determination.⁹

Moreover, the Office did not act in accordance with its procedures which address cases where a claimant stops work after reemployment. In the present case, the Office issued a formal loss of wage-earning capacity decision on April 26, 1987 and appellant retired effective February 11, 1990. Office procedures provide that a decision effectuating a termination of compensation based on refusal of an offer of suitable work should not be issued in such a case.¹⁰

For these reasons, the Office improperly terminated appellant's compensation benefits effective August 10, 2003 on the grounds that he refused an offer of suitable work and, therefore, the August 27, 2003 decision is reversed.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits, effective August 10, 2003, on the grounds that he refused suitable work as the Office failed to comply with the Act and its procedures which would require modification of the April 26, 1987 wage-earning capacity determination.

⁹ The Board has previously addressed instances in which formal loss of wage-earning capacity decisions remain undisturbed unless modified in accordance with the above-described criteria. In *Wallace D. Ludwick*, 38 ECAB 176 (1986), the Office issued a formal loss of wage-earning capacity in which it determined that the employee's wage-earning capacity was represented by the position of deputy, a position which he had been performing. The Office then terminated the employee's compensation based on his refusal of a job which had been offered by the employing establishment and determined by the Office to be suitable. The Board reversed the Office's termination indicating that the loss of wage-earning capacity decision had not been modified and that the employee's refusal of the offered position was justified by the work which had been determined to represent his wage-earning capacity.

¹⁰ *Robert L. Edwards*, Docket No. 01-1197 (issued May 19, 2003).

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member